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No. 07-1380

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

DOROTHY OWENS, as Conservator of Mary Francis King, an incapacitated person,

Petitioner,

v.

NATIONAL HEALTH CORPORATION d/b/a NHC HEALTHCARE, MURFREESBORO; NATIONAL HEALTHCORP, L.P.; NATIONAL HEALTH REALTY, INC.; NHC, INC. a/k/a NHC, INC. – TENNESSEE; NHC/OP, L.P.,

Respondents.

On Petition For Writ Of Certiorari To The Tennessee Supreme Court

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court review a decision of the Tennessee Supreme Court, which holds, consistent with every other court having considered the issue, that a mandatory arbitration agreement executed contemporaneously with a contract for nursing home care does not violate federal statutes and regulations prohibiting the charging of other consideration for patients entitled to medical assistance through Medicare and Medicaid?

PARTIES TO THE PROCEEDINGS

The following persons or entities participated in the proceedings an the Tennessee Supreme Court and the trial court:

Plaintiff/Petitioner:

Dorothy Owens, as Conservator of Mary Francis King, an incapacitated person

Defendants/Respondents:

National Health Corporation d/b/a NHC Healthcare, Murfreesboro

National Healthcorp, L.P.

National Health Realty, Inc.

NHC, Inc. a/k/a NHC, Inc. – Tennessee

NHC/OP L.P.

Defendant:

National HealthCare Corporation

Defendant National HealthCare Corporation was added as a party defendant during the sixty (60) day interim period between the decision of the Tennessee Court of Appeals and the Petitioner's application for permission to appeal to the Tennessee Supreme Court. Because National HealthCare Corporation was not part of Respondents' original Motion to Compel Arbitration, it was not a party to the appeal. Nevertheless, because of the vested interest of National HealthCare Corporation in the decision by the Tennessee Supreme Court, as well as any decision by this Court, the parent/subsidiary status is stated for the purpose of full disclosure.

STATEMENT REGARDING PARENT/SUBSIDIARY STATUS

Respondent National Health Corporation d/b/a NHC Healthcare, Murfreesboro does not have a parent corporation, and there is no publicly held company that owns 10% or more of its stock.

Respondent National Healthcorp, L.P. no longer exists as a legal entity.

Respondent National Health Realty, Inc. no longer exists as a legal entity.

Respondent NHC, Inc. a/k/a NHC, Inc. – Tennessee no longer exists as a legal entity.

Respondent NHC/OP, L.P. does not have a parent corporation, and there is no publicly held company that owns 10% or more of its stock.

Defendant National HealthCare Corporation does not have a parent corporation, and there is no publicly held company that owns 10% or more of its stock.

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STATEMENT OF THE CASE

Plaintiff filed suit in the Circuit Court for Rutherford County, Tennessee alleging, *inter alia*, negligence on the part of the Defendants in the care and services provided to Mary Francis King (hereinafter, "King"), an otherwise incapacitated person. At the time of the alleged acts, King was a resident of a nursing home facility owned by National Health Corporation d/b/a NHC HealthCare, Murfreesboro in Murfreesboro, Tennessee. The Plaintiff, in her representative capacity as conservator of King, filed her Complaint with a jury demand on February 10, 2005. In lieu of filing an Answer or other responsive pleading, Defendants filed a Motion to Compel Arbitration and Stay Proceedings on March 17, 2005. To date, Defendants have not filed a formal response to Plaintiff's allegations, which are denied.

Defendants' Motion to Compel Arbitration and Stay Proceedings was premised upon an arbitration provision in an admission and financial contract signed by Gwyn Daniel and John Smith on August 26, 2003 when admitting King to the Murfreesboro facility. Ms. Daniel was the attorney-in-fact under a durable power of attorney for health care executed by King on August 5, 2003.

On April 8, 2005, a hearing was held in the Circuit Court of Rutherford County on the Defendant's Motion to Compel Arbitration. Following oral argument of the respective counsel, the court took the matter under advisement but expressed reservations,

inter alia, as to whether the attorney-in-fact had authority to waive King's constitutional right to a jury trial.

On April 18, 2005, the trial court corresponded with counsel and advised of its decision to deny the Defendants' motion. The letter was incorporated by reference into an Order denying the Defendants' Motion to Compel Arbitration on May 3, 2005. The trial court's denial of the Motion to Compel Arbitration was premised upon two exclusive grounds, namely that the attorney-in-fact lacked the legal authority to execute an arbitration agreement in securing long-term care, as well as a finding that the arbitral entities listed in the agreement were no longer available, thereby depriving the Plaintiff of a remedy at law. An appeal followed.

On June 30, 2006, the Tennessee Court of Appeals reversed and remanded the decision of the trial court, finding that the attorney-in-fact under the durable power of attorney for healthcare had authority to execute an arbitration agreement on behalf of the resident, and that the unavailability of the arbitral entities listed in arbitration agreement did not render the Plaintiff without a remedy at law. The Court of Appeals further addressed a myriad of other grounds asserted by Plaintiff in opposition to the arbitration agreement, including its purported illegality in light of Medicare/Medicaid statutes and regulations prohibiting "other consideration" as a condition of admission. The Court of Appeals, relying upon

persuasive case law from other state courts, found the arbitration agreement did not violate federal law.

The Plaintiff thereafter filed an application for appeal to the Tennessee Supreme Court, which was subsequently granted. The Tennessee Supreme Court delivered its opinion on November 8, 2007, affirming in part and vacating in part the decision by the Court of Appeals. Unrelated to the issue before this Court, the Tennessee Supreme Court later granted in part and denied in part the Defendants' Petition for Rehearing, with a modified opinion following.

In short, the Tennessee Supreme Court affirmed the decision by the Court of Appeals in finding that the execution of a mandatory arbitration agreement does not constitute "other consideration" as contemplated by pertinent federal statutes and regulations governing Medicare and Medicaid. Contrary to Petitioner's argument, the Tennessee Supreme Court did not simply agree with the Court of Appeals, but rather examined all reported cases of other jurisdictions that had considered the same argument. While acknowledging that the other cases were not binding, the Tennessee Supreme Court nevertheless found their rationale persuasive, and concluded that requiring a Medicare/Medicaid recipient to agree to binding arbitration when being admitted to a nursing home does not constitute an additional fee or other consideration prohibited by federal law.

STATEMENT OF FACTS

On August 5, 2003, Mary Francis King executed a Durable Power of Attorney for Health Care wherein she named William T. Daniel and Gwyn C. Daniel as her attorneys-in-fact. As evidenced by language in the Power of Attorney, the document was to be durable, thereby surviving King's incapacitation, and included authority to engage medical providers. The Power of Attorney further provides "I grant to my Attorney-in-Fact the power and authority to execute on my behalf any waiver, release or other document which may be necessary in order to implement the health care decisions that this instrument authorizes my Attorney-in-Fact to assist me to make, or to make on my behalf."

On August 26, 2003, Gwyn Daniel and John Smith executed an Admission and Financial Contract (hereinafter, "Contract") with National Health Corporation d/b/a NHC Healthcare, Murfreesboro for the purpose of admitting King as a patient to the facility. The Contract, among its other provisions, including a separate section entitled "**DISPUTE RESOLUTION PROCEDURE (WHICH INCLUDES JURY TRIAL WAIVER).**" (emphasis in original) Pursuant to the terms of that section, the parties to the Contract agreed that all disputes would be submitted to either mediation or arbitration. Specifically, the Contract reads "**BY AGREEING TO ARBITRATION OF ALL DISPUTES, BOTH PARTIES ARE WAIVING A JURY TRIAL FOR ALL CONTRACT, TORT,**

STATUTORY, REGULATORY, AND OTHER CLAIMS." (emphasis in original)

In acknowledgement of the arbitration language, both Gwyn Daniel and John Smith signed a separate box wherein they agreed to be bound by the arbitration language and stated that the terms regarding arbitration had been explained to them.

On February 10, 2005, Plaintiff Dorothy Owens instituted the instant action by filing a Complaint in the Circuit Court of Rutherford County, Tennessee alleging, among other things, negligence on the part of the named Defendants in causing personal injury to King.

SUMMARY OF ARGUMENT

Respondents submit that any review of the decision by the Tennessee Supreme Court is unwarranted. As conceded by the Petitioner, no court, whether federal or state, has ever held that a mandatory arbitration agreement violates Medicare/Medicaid law and regulations regarding the prohibition of "other consideration." Accordingly, there is no conflict of authority requiring intervention by this Court. Moreover, contrary to Petitioner's argument, the issue does not present an important question of federal law, evidenced in part by the relatively few cases where the issue has ever been raised.

Respondents further submit that review by this Court of the decision by the Tennessee Supreme Court is improper because any reliance upon Tennessee interpretation of "other consideration" could result in inconsistent application of the same federal law and regulations because of variances in differing state laws. Where other states may employ an altogether different definition of "consideration," this Court's decision would arguably only apply to Tennessee's definition on the question.

Lastly, Respondents submit that various interpretations by federal agencies charged with enforcing the statute and regulation in question have found that "other consideration" must be monetary in nature, and that an arbitration agreement in a nursing home contract does not violate federal law. These interpretations are entitled to considerable weight in interpreting the subject language, particularly where Congress has not addressed the issue.

ARGUMENT

1. The Arbitration Agreement Does Not Constitute Other Consideration In Violation Of Federal Law.

The Petitioner argues that execution of the arbitration agreement constitutes "other consideration" as a precondition of admission to the nursing home in violation of federal law governing Medicare and Medicaid. Notably, the Petitioner's Writ contains

a dearth of case law interpreting an arbitration clause in a nursing home admission contract to be inconsistent with those federal regulations. To the Contrary, as evidenced by the well-reasoned decision of the Tennessee Supreme Court, persuasive case law from other jurisdictions demonstrates the weight of authority is contrary to the Petitioner's argument.

In deciding this issue, the Tennessee Supreme Court closely examined the language of the applicable federal statute and regulation. The federal statute provides, in pertinent part, that a participating nursing home in the federal Medicaid program must:

> in the case of an individual who is entitled to medical assistance for nursing facility services, not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the State plan under this subchapter, any gift, money, donation, or other **consideration** as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual's continued stay in the facility.

42 U.S.C. § 1396r(c)(5)(A)(iii) (Supp. 2007) (emphasis added). Language in the federal regulation closely tracks that of the federal code:

> In the case of a person eligible for Medicaid, a nursing facility must not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the State plan, any gift, money, donation, or

> other consideration as a precondition of admission, expedited admission or continued stay in the facility.

42 C.F.R. § 483.12(d)(3) (2006) (emphasis added).

The Tennessee Supreme Court noted that other jurisdictions have rejected Petitioner's argument. The court principally relied upon a decision by the Alabama Supreme Court in *Owens v. Coosa Valley Health Care, Inc.*, 890 So. 2d 983 (Ala. 2004), wherein the court stated:

> [R]equiring a nursing-home admittee to sign an arbitration agreement is not charging an additional fee or other consideration as a requirement to admittance. Rather, an arbitration agreements sets a forum for further disputes; both parties are bound to it and both receive whatever benefits and detriments accompany the arbitral forum. If we were to agree with [the plaintiff], virtually any contract term [the plaintiff] decided she did not like could be construed as requiring "other consideration" in order to gain admittance to the nursing home and thus be disallowed by statute.

Id. at 898. The Tennessee Supreme Court further relied upon the holding of the Indiana Court of Appeals in *Sanford v. Castleton Health Care Center, LLC*, 813 N.E.2d 411, 419 (Ind. Ct. App. 2004). In construing the same statute in the context of the same argument, the *Sanford* court undertook to apply tools of statutory construction, namely the principle

of *ejusdem generis*, which provides that a general term in a statute that follows a series of specific items must be limited in scope to the same type as those listed. *Id.* In this instance, the *Sanford* court noted that preceding the prohibition against "other consideration," the statute specifically lists gifts, money and donations. *Id.* The court reasoned that an arbitration agreement is not tantamount to a gift, money, or donation, and therefore the prohibition was inapplicable. *Id.*

Finally, the Tennessee Supreme Court cited and selectively quoted from other cases addressing the same issue, including *Gainesville Health Care Center v. Weston*, 857 So. 2d 278, 288 (Fla. Ct. App. 2003); and *Broughsville v. OHECC, LLC*, No. 05CA008672, 2005 WL 3483777, *8 (Ohio Ct. App. Dec. 21, 2005), both of which found that agreements to arbitrate are not additional consideration in violation of federal regulations prohibiting the same.

The reasoning by the Alabama Supreme Court in *Owens* is particularly persuasive insomuch that the court extrapolated the Petitioner's argument to demonstrate its likely absurd result. If "other consideration" as prohibited by federal law is extended to any mutual promise or obligation on the part of the nursing home admittee, then any term to the contract aside from the charges to be incurred would potentially be illegal. The consequences would be enormous and would create chaos detrimental to nursing home residents and facilities alike, while subverting the clear intent of Congress. The interpretation advocated

by Petitioner would likewise promote abuse of the federal law, such as in this instance, where a party, *post hoc*, would seek to render an entire agreement illegal so as to avoid a mutual obligation due to a change in circumstances.

The *Sanford* reasoning is likewise persuasive. Only recently this Court employed the principle of *ejusdem generis* in construing the Federal Arbitration Act in *Hall Street Associates, LLC v. Mattel, Inc.*, 128 S. Ct. 1396, 1404-1405 (2008). In deciding the exclusive grounds upon which a party could seek relief from an arbiter's award, this Court noted that "the old rule of ejusdem generis has an implicit lesson to teach here. Under that rule, when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows." *Id.* at 1404.

In this instance, it is evident that the specifics preceding "other consideration," namely gift, money and donation, in both the federal statute and regulation are not comparable to an arbitration agreement, which merely speaks to the forum in which the parties agree to resolve disputes. Both the statute and the regulation clearly contemplate that "other consideration" will encompass something of monetary value for the purpose of inducing admittance to a nursing home or continued residence at the same.

Petitioner merely glosses over this point by stating that if Congress had intended to mean "financial consideration," then it could have employed that

language in lieu of "other consideration." (Petition, p. 18) However, "financial consideration" alone may not have included the broadest reach of prohibition that Congress was intending to address where, for example, a facility might obligate an admittee to donate personal property to gain admittance. Personal property arguably would not be financial consideration if it had not been reduced to negotiable instruments.

Respondents submit that in this instance, the arbitration agreement merely provided that the parties were mutually agreeing to shift all disputes to an alternative forum, which in no way deprives the resident of an ability to seek redress for any purported harms.

2. Petitioner's Writ Would Require This Court To Afford Unfettered Deference To Tennessee's Legal Definition Of Consideration

In her Writ, Petitioner asserts "It is unquestionable that Tennessee law considers the waiver of a right to be consideration." (Petition, p. 4) Petitioner then glosses that under any "common understanding of the word, giving up a right in exchange for some other product or service is 'consideration.'" (*Id.*) However, Petitioner relies upon nothing other than Tennessee's interpretation of "consideration" as grounds for her p[illegible]ition.

Under our federalist system of government, federal courts are obliged to defer to state courts

regarding interpretation of a state's own law. *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). However, federal courts owe no deference to a state court's interpretation of a federal statute. *Kuhnle Brothers, Inc. v. County of Geauga*, 103 F.3d 516, 520 (6th Cir. 1997)

In this instance, provided this Court granted Petitioner's Writ and found that Tennessee's interpretation of consideration was in some manner binding on the federal statute and regulation, then the unintended consequence would mean that the language in question would be subject to the interpretation of each of the respective states. Tennessee's interpretation of "consideration" may not be consistent with that of Alabama or California, for example, thereby creating inconsistency in the application of federal law. That is counter to our federalist system, whereby the states are obliged to defer to federal law where a federal question is involved. That said, Petitioner's reliance upon Tennessee law should not give grounds to this Court to decide an important question of federal law.

3. Federal Agencies Have Not Interpreted The Subject Regulation Consistent With Petitioner's Argument

Lastly, after an exhaustive review of the history of the Omnibus Budget Reconciliation Act of 1987, which encompasses the statute, and therefore the regulation in question, Petitioner asserts that the

federal agency charged with enforcement has been "evasive and equivocating" regarding whether an arbitration agreement may be required as a condition of admission. This characterization is based upon language in a *Memorandum* from the Centers for Medicare and Medicaid Services, which is reproduced only in part in Petitioner's Writ. (Petition, p. 19-20) Notably, the "evasive and equivocating" description of the *Memorandum* is derived exclusively from scholarship addressing this issue, the title of which clearly demonstrates the agenda of its author: *Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts with Residents*. (Petition, p. 19-20)

Notwithstanding the foregoing, Respondents submit that interpretations by federal agencies are actually in accord with the reasoning of all courts that have considered this issue. Since no federal court has addressed this matter, then the interpretations of the federal agencies should be given considerable deference. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court noted:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines that Congress

has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

"The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."

* * *

We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations "has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting polices, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations."

" . . . If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative

> history that the accommodation is not one that Congress would have sanctioned."

Id. at 842-845. (internal citations omitted).

As mentioned above, Petitioner's Writ selectively reproduces from the *Memorandum* issued by the Centers for Medicare and Medicaid Services. In the memo, dated January 9, 2003, the director of the Survey and Certification Group addressing "Binding Arbitration in Nursing Homes" noted:

> The purpose of this memorandum is to address the Centers for Medicare and Medicaid Services' (CMS) position regarding binding arbitration between nursing homes and prospective or current residents, in response to recent marketplace practices. Specifically, this memorandum addresses the use of an agreement that requires disputes between a prospective or current resident and the nursing home be resolved through binding arbitration either as a condition of admission or a condition of remaining in the nursing home. Under these agreements, the resident gives up his or her right to sue the nursing home through the judicial process.
>
> CMS believes that its primary focus should be on the quality of care actually received by nursing home residents that may be compromised by such agreements, for the reasons set out below. **Under Medicare, whether to have a binding arbitration agreement is an issue between the resident and the nursing home. Under**

> **Medicaid, we will defer to State law as to whether or not such binding arbitration agreements are permitted** subject to the concerns we have where Federal regulations may be implicated. . . .

Memorandum from the Centers for Medicare & Medicaid Services to the Survey and Certification Group Regional Office Management (G-5) State Survey Agency Directors (Jan. 9, 2003) (emphasis added).

The memo, appended to this Brief, goes on to further outline potential concerns regarding discharge based on an existing resident's failure "to sign or comply with a binding arbitration agreement" and notes that current residents are not obligated to sign new admission documents containing a binding arbitration agreement. *Id.*

The foregoing interpretation clearly evidences that arbitration agreements with prospective patients are not illegal *per se* due to participation in the Medicare/Medicaid program by a nursing home facility, contrary to Petitioner's argument.

With respect to the specific regulation at issue, the Department of Health and Human Services has also commented upon its intended purpose. The Department found that

> We believe that revised § 483.12(d)(3) only prohibits the nursing facility from charging/soliciting or accepting/receiving gifts from or on behalf of a Medicaid recipient when these

> gifts are intended to purchase preferential treatment for a Medicaid recipient, presumably over other Medicaid recipients. Gifts given by or on behalf of Medicaid recipients for purposes other than to gain admission, expedited admission or continued stay are not prohibited.

Rules and Regulations Department of Health and Human Services, Health Care Financing Administration, RIN 0938-AD12, Medicare and Medicaid; Requirements for Long Term Care Facilities (Sept. 26, 1991), 56 FR 48826-01.

This interpretation by the Department demonstrates the Congressional intent in prohibiting gifts, money, donations or other consideration where the same is solicited to gain more favorable treatment or admission. In this instance, every resident, whether on Medicare/Medicaid or not, is obliged to execute the arbitration agreement to gain admittance.

Lastly, a recently published draft opinion from the Office of the Inspector General regarding Supplemental Compliance Program for Nursing Home Facilities discusses the regulation at issue. The OIG draft notes:

> As a condition of its Medicare provider agreement and under applicable Medicaid regulations and a criminal provision precluding supplementation of Medicaid payment rates, a nursing facility must accept the applicable Medicare or Medicaid payment (including any

> beneficiary coinsurance or copayments authorized under those programs), respectively, for covered items and services as the complete payment. For covered items and services, **a nursing facility may not charge a Medicare or Medicaid beneficiary, or another person in lieu of the beneficiary, any amount in addition to what is otherwise required to be paid under Medicare or Medicaid** (i.e., a cost-sharing amount). For example, an SNF may not condition acceptance of a beneficiary from a hospital upon receiving payment from the hospital or the beneficiary's family in an amount greater than what the SNF would receive under the PPS. **For Medicare and Medicaid beneficiaries, a nursing facility may not accept supplemental payments, including, but not limited to, cash and free or discounted items and services, from a hospital or other source merely because the nursing facility considers the Medicare or Medicaid payment to be inadequate (although a nursing facility may accept donations unrelated to the care of specific patients). The supplemental payment would be a prohibited charge imposed by the nursing facility on another party for services that are already covered by Medicare or Medicaid.**

Notice, Department of Health and Human Services, Office of Inspector General, Draft OIG Supplemental Compliance Program Guidance for Nursing Facilities (Apr. 16, 2008), 73 FR 20680-02 (emphasis added).

Based upon the foregoing interpretations of federal law governing nursing home participating in Medicare/Medicaid program, it is evident that the executive departments charged with enforcing the same do not find mandatory arbitration agreements for prospective patients to be prohibited. Also, the federal agencies' interpretation of "other consideration" makes it clear that the intent is to avoid preferential treatment in exchange for something of value in the manner of a gift or donation having some remunerative value.

CONCLUSION

In the absence of any authority to support her Petition, Petitioner has not established any compelling reason for this Court to consider the issue *sub judice*. Therefore, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

June 5, 2008

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Center for Medicaid and State Operation

[LOGO]

Ref: S&C-03-10

DATE: January 9, 2003

FROM: Director
Survey and Certification Group

SUBJECT: Binding Arbitration in Nursing Homes

TO: Survey and Certification Group Regional Office Management (G-5) State Survey Agency Directors

The purpose of this memorandum is to address the Centers for Medicare & Medicaid Services' (CMS) position regarding binding arbitration between nursing homes and prospective or current residents, in response to recent marketplace practices. Specifically, this memorandum addresses the use of an agreement that requires disputes between a prospective or current resident and the nursing home be resolved through binding arbitration either as a condition of admission or a condition of remaining in the nursing home. Under these agreements, the resident gives up his or her right to sue the nursing home through the judicial process.

CMS believes that its primary focus should be on the quality of care actually received by nursing home

residents that may be compromised by such agreements, for the reasons set out below. Under Medicare, whether to have a binding arbitration agreement is an issue between the resident and the nursing home. Under Medicaid, we will defer to State law as to whether or not such binding arbitration agreements are permitted subject to the concerns we have where Federal regulations may be implicated. Under both programs, however, there may be consequences for the facility where facilities attempt to enforce these agreements in a way that violates Federal requirements.

Survey and Certification Guidance:

1. If a nursing home discharges a resident or retaliates due to an existing resident's failure to sign or comply with a binding arbitration agreement, the State and Region may initiate an enforcement action based on a violation of the rules governing resident discharge and transfer. A current resident is not obligated to sign a new admission agreement that contains binding arbitration. Federal regulations, at 42 C.F.R. §483.12(a)(2) limit the circumstances under which a facility may discharge or transfer a resident. None of the conditions specified in the regulation permit a facility to discharge or transfer a resident based on his or her failure to comply with the terms of a binding arbitration agreement. Additionally, a facility that retaliates against a resident who fails to sign or comply with the agreement is subject to an enforcement response based on its failure to comply with the obligation to furnish an abuse free environment under 42 C.F.R. §483.13(b) or

other requirements bearing on the facility's obligation to provide quality care to all residents. The existence of a binding arbitration agreement does not in any way affect the ability of the State survey agency or CMS to assess citations for violations of certain regulatory requirements, including those for Quality of Care.

2. The Medicaid appeal procedures at 42 C.F.R. §431.200 et seq. apply to discharges or disputes of eligibility between the resident and the State Medicaid Agency and are not affected by a binding arbitration agreement.

Effective Date: This policy is in effect immediately.

Training: This policy should be shared with all appropriate survey and certification staff, their managers, and the state/regional office training coordinator.

/s/
Steven A. Pelovitz